No. 02-102

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IN THE

Supreme Court of the United States

OCTOBER TERM, 2002

JOHN GEDDES LAWRENCE and TYRON GARNER,

Petitioners,

—v.—

TEXAS,

Respondent.

ON PETITION FOR WRIT OF *CERTIORARI* TO
THE COURT OF APPEALS OF TEXAS, FOURTEENTH DISTRICT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS*[1]

The American Civil Liberties Union (ACLU) and its state affiliates are a nationwide, nonprofit, nonpartisan organization with approximately 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU has appeared before this Court in numerous cases involving the proper interpretation of the Constitution as it applies to criminal laws, including as direct counsel for respondent in *Bowers v. Hardwick*, 478 U.S. 186 (1986). The ACLU has advocated for interpretations of the Constitution that prevent the criminality of conduct from turning on the identity of the actor and that recognize a sphere of privacy sheltered from intrusion by the state. The proper application of the Constitution to the criminal law at issue in this case is a matter of significant concern to the ACLU and its members throughout the country.

STATEMENT OF THE CASE

Responding to a false report of a weapons disturbance, police entered John Lawrence's home and found Lawrence and Tyron Garner being sexually intimate. The police arrested them for violating Texas Penal Code § 21.06, which criminalizes "deviate sexual intercourse" (defined to include oral or anal sex) for a same-sex couple but not for an opposite-sex couple. After the trial court denied motions to quash the charges on federal and state equal protection and privacy grounds, Lawrence and Garner pled no contest. The court found both men guilty. Petition for *Certiorari* at App. 86a-141a, *Lawrence v. Texas*, No. 02-102 (filed July 16, 2002).

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amicus* states that no counsel for a party authored this brief in whole or in part and no person, other than *amicus*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

The Texas Court of Appeals affirmed the convictions and the Texas Court of Criminal Appeals denied review. *Id.* at 1a-4a.

REASONS FOR GRANTING THE WRIT

The Court should grant *certiorari* in this case because the challenged law, and others like it, make a mockery of the constitutional promise of equal protection: a promise that the States will not "singl[e] out a certain class of citizens for disfavored legal status . . . ." *Romer v. Evans*, 517 U.S. 620, 633 (1996). Texas violates the Equal Protection Clause of the Fourteenth Amendment by making "deviate sexual intercourse" a legal act for heterosexuals but a criminal one for lesbians and gay men. Section 21.06 makes certain sexual intimacies a crime for same-sex partners. Opposite-sex partners, however, may engage in the *identical* physical acts without risking criminal prosecution.[2] Such a classification is antithetical to the core concept of equal protection.

The Court should also grant review in this case because the constitutionality of sodomy laws is a question of compelling importance in light of the devastating ways such laws affect lesbians and gay men. Besides the obvious effect of criminal convictions and penalties for gay people, laws such as § 21.06 are used to distort current political debates ranging from whether discrimination based on sexual orientation should be legal to whether a municipality should offer health benefits to the domestic partners of its employees. Sodomy laws are also used to brand gay people as criminal and, as a result, to separate them from their children and to deny them jobs. The fact that laws like § 21.06 have such far-reaching effects renders their constitutionality a question of substantial importance that the Court should decide.

Finally, the Court should grant review in this case to reconsider its ruling in *Bowers v. Hardwick*, 478 U.S. 186 (1986), which fundamentally distorted the Court's privacy jurisprudence. Although not addressed separately here, *amicus* fully supports the due process arguments presented by petitioners. *See* Petition for *Certiorari* at 22-30, *Lawrence v. Texas*, No. 02-102 (filed July 16, 2002).

I. Making the Criminality of Conduct Depend on the Sexual Orientation of the Actor Is Anathema to Equal Protection

Making the criminality of an act turn on any aspect of the actor's identity—whether race, alienage, sex, or sexual orientation—violates a basic principle of equal protection. Texas's refusal to recognize this fundamental tenet merits review by the Court. *See McLaughlin v. Florida*, 379 U.S. 184, 192 (1964) (holding that adherence to equal protection principles is particularly important in the context of a criminal law, "where the power of the State weighs most heavily upon the individual or the group").

Governments have a sorry history of attempting to use the criminal law against disfavored groups by penalizing who people are, rather than what they do. In earlier periods of our history, it was a crime to marry if you did so outside of your race, to practice certain professions if you were a woman, to own land if you were an alien, or to receive government benefits if you were a "hippie." Again and again, courts have intervened and struck down these laws, recognizing that there can be no more fundamental violation of equal protection than to make the criminality of one's conduct depend on one's identity.

[2] Although Texas Penal Code § 21.01 defines "deviate sexual intercourse" in neutral terms, "deviate sexual intercourse" between consenting adults, not for pay, is a crime only when the defendant engages in the specified conduct "with an individual of the same sex." *See id.* § 21.06.

The Court has long made it clear that the law may not impose different penalties for "those who have committed intrinsically the same quality of offense." *McLaughlin*, 379 U.S. at 194 (citations omitted). In *McLaughlin*, the state of Florida made it a crime for unmarried interracial couples to live together, but not for unmarried same-race couples. *Id.* at 184-86. The Court struck down this law as a violation of fundamental equal protection principles. As Justice Stewart explained, it is impossible to "conceive of a valid legislative purpose under our Constitution for a state law which makes the color of a person's skin the test of whether his conduct is a criminal offense. . . . [I]t is simply not possible for a state law to be valid under our Constitution which makes the criminality of an act depend upon the race of the actor. Discrimination of that kind is invidious per se." 379 U.S. at 197 (Stewart, J., concurring).

The same principle was endorsed in *Oyama v. California*, 332 U.S. 633 (1948), where a state had made it a crime for an alien to own land, but not for a citizen. *See id.* at 647-48 (Black, J. concurring) (discussing criminal penalties). The Court narrowly avoided addressing whether the state's Alien Land Law violated equal protection. But as the four concurring Justices recognized, and as the full Court surely would today, making the criminality of land ownership turn on citizenship is contrary to bedrock equal protection values. *See id.* at 647-49 (Black and Douglas, JJ. concurring), 650-51 (Murphy and Rutledge, JJ. concurring).

For the same reasons, a California law that made tending bar a crime for women but not for men was found to violate federal equal protection. *Sail'er Inn, Inc. v. Kirby*, 485 P.2d 529, 531 n.2, 543 (1971). The court held that making an act criminal for women but not for men was "invidious and wholly arbitrary." *Id.* at 22. Indeed, the equal protection violation was so stark that the court effectively invalidated

the law under the lowest level of review—rational basis—because it found that the state had failed "to establish any interest at all" that would be served by such a classification. *Id.; see also Craig v. Boren*, 429 U.S. 190, 204 (1976) (finding equal protection violation where statute criminalized sale of alcohol to 18-20 year-old males but not to 18-20 year-old females); *Lamb v. Brown*, 456 F.2d 18, 20 (10th Cir. 1972) (finding equal protection violation where teenage males were held criminally responsible as adults but teenage females were not).

Similarly, when Congress made it a crime for unrelated individuals living together as a household to receive food stamps, but not for related individuals to do so, the Court found an equal protection violation. *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 536 & n.8 (1973). Recognizing that the law was aimed at disadvantaging hippies, the Court explained that a "bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." *Id.* at 534-35.

Singling out lesbians and gay men is no more permissible than singling out any other group of people for criminal penalties that depend not on the nature of the illegal act but on who performs that act. Just as the criminality of cohabiting, *see McLaughlin*, 379 U.S. at 194, owning land; *see Oyama*, 332 U.S. at 647-48 (Black, J., concurring); or tending bar, *see Sail'er Inn*, 485 P.2d 531 n.2, may not depend on the race, citizenship, or sex of the actor, the criminality of being intimate in certain ways may not depend on the sexual orientation of the actor. Certainly, Texas could not constitutionally criminalize "deviate sexual intercourse" by interracial couples but not by same-race couples; by couples made up of aliens but not citizens, or by disabled couples but not able-bodied ones. The same line, drawn at sexual orientation, offends equal protection in precisely the same manner. The Court should grant *certiorari* in this case

to clarify that making the criminality of a person's conduct depend on his sexual orientation is "invidious per se." *McLaughlin*, 379 U.S. at 197 (Stewart, J., concurring).

Any claim that the physical acts specified in the Texas law are "different" when performed by members of the opposite sex is impossible to square with the text of that statute. Texas defines "deviate sexual intercourse" as "any contact between any part of the genitals of one person and the mouth or anus of another person . . . ." Tex. Penal Code § 21.01(1).[3] Thus, deviate sexual intercourse occurs whenever a mouth touches genitalia, regardless of whether the mouth and genitalia belong to people of the same or different sexes. Under § 21.06, the identical physical acts trigger criminal liability for some people, but are perfectly legal for others. The sole dividing line between licit and illicit is whether the couple is same-sex or opposite-sex. And, as the Kansas Court of Appeals recognized in a similar case, "the argument that [a statute criminalizing same-sex but not opposite-sex conduct] is not aimed at homosexuals cannot be made with a straight face." *State v. Limon*, No. 85,898, slip op. at 6 (Kan. Ct. App. Feb. 1, 2002), *review denied*, No. 00-85898-A (Kan. June 13, 2002);[4] *see also Commonwealth v. Wasson*, 842 S.W.2d 487, 502 (Ky. 1992) (recognizing that, under Kentucky's same-sex sodomy law, "[s]exual preference, and not the act committed, determines criminality, and is being punished.").

The fact that the criminality of deviate sexual intercourse depends on the sexual orientation of the actors, rather than on some intrinsic difference in the acts themselves, is illustrated by analogy to the facts of *McLaughlin*, where Florida

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[3] The definition of deviate sexual intercourse also includes "the penetration of the genitals or the anus of another person with an object." Tex. Penal Code § 21.01(1).

[4] Petitioners have lodged copies of *Limon* with the Clerk of the Court.

criminalized cohabitation by interracial couples. There, the Court rejected Florida's argument that, because the cohabitants were of different races instead of the same race, the act of cohabitation was intrinsically different, and thus a separately punishable crime. 379 U.S. at 188-90 & n.7 (rejecting reliance on *Pace v. Alabama*, 106 U.S. 583 (1883)). Similarly here, the acts that Texas describes as "deviate sexual intercourse" do not become intrinsically different when the actors are of the same instead of the opposite sex. Just as race was central to what made cohabitation criminal in *McLaughlin*, so sexual orientation is central to what makes "deviate sexual intercourse" criminal here; both classifications in the criminal law are "invidious per se." *McLaughlin*, 379 U.S. at 197 (Stewart, J., concurring).

II. Sodomy Laws Inflict Acute Harms on Lesbian and Gay Individuals, Families, and Communities

In jurisdictions across the country, sodomy laws disadvantage gay and lesbian individuals, families, and communities in myriad ways. The acute and systemic harms worked by these laws make the question of their constitutionality one "the settlement of which is of importance to the public," rather than just to "the parties." *Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 79 (1955) (citation omitted). Because sodomy laws, including Texas Penal Code § 21.06, cause such pervasive harm, the Court should grant *certiorari* to decide whether such laws violate the constitutional guarantees of both equal protection and due process.

Thirteen states have sodomy laws. Four of these have laws that, like the Texas provision at issue in this case, only

apply to same-sex couples.[5] Nine states have statutes that prohibit all private consensual sodomy, whether same-sex or opposite-sex.[6] Even the facially neutral laws, however, are often treated by the courts that enforce them and by the public more generally as if they targeted gay people.[7]

[5] Kan. Stat. Ann. § 21-3505(a)(1) (6 month prison term); Mo. Rev. Stat. § 566.090 (1 year) (*but see State v. Cogshell*, 997 S.W.2d 534 (Mo. Ct. App., W. Div. 1999) (interpreting statute to apply only to non-consensual activity); Okla. Stat. tit. 21, § 886 (10 years) (generally applicable statute construed by *Post v. State*, 715 P.2d 1105 (Okla. Crim. App. 1986) not to cover heterosexual consensual behavior); Texas Penal Code § 21.06 (monetary penalty).

[6] The jurisdictions with laws criminalizing all private consensual sodomy (whether same-sex or opposite-sex) are: Ala. Code §§ 13A-6-60(2), 13A-6-65(a)(3) (1 year prison term); Fla. Stat. Ann. § 800.02 (60 days); Idaho Code § 18-6605 (5 years to life); La. Rev. Stat. Ann. § 14:89 (5 years); Miss. Code Ann. § 97-29-59 (10 years); N.C. Gen. Stat. § 14-177 (3 years); S.C. Code Ann. § 16-15-120 (5 years); Utah Code Ann. § 76-5-403(1) (6 months); Va. Code Ann. § 18.2-361(A) (5 years). The Commonwealth of Puerto Rico also has a sodomy law, which makes oral and anal sex a crime for everyone, but any sexual intimacy (including touching or arguably even kissing) a crime for gay people only. P.R. Penal Code Art. 103 (6-12 years).

[7] *See, e.g.*, Virginia—*Roe v. Roe*, 324 S.E.2d 691, 694 (Va. 1985) (denying gay father custody of his child based on court's assumption that he was engaging in unlawful sodomy; court did not assume that child's mother was engaging in sodomy despite the fact that Virginia's sodomy law covers sodomy by everyone); Utah— Floor Debate, Statement of Rep. Merrill Nelson, 49th Utah Leg., Gen. Sess. (Feb. 11, 1992) (House recording no. 1, side A) (successfully urging rejection of anti-discrimination protection for gay people because "[H]omosexuality, sodomy, is prohibited under Utah law," despite the fact that Utah bans sodomy between same- and opposite-sex couples and therefore all individuals could equally have been presumed to be committing criminal acts); Mississippi—*Weigand v. Houghton*, 730 So. 2d 581, 591 (Miss. 1999) (denying gay father custody of his son based assumption that father engaged in "homosexual activity," which is "felonious conduct" in Mississippi; no parallel assumption that child's mother similarly engaged in unlawful sodomy despite the fact that state's law criminalizes all sodomy). *See generally* Diana Hassel, *The Use of Criminal Sodomy Laws In Civil Litigation*, 79 Tex. L. Rev. 813, 829-843 (2001) (collecting examples of how lesbians and gay men are presumed to be violating

Indeed, at least one court has expressly held that lesbians and gay men were the target of a facially neutral sodomy law. *See Ex parte J.M.F.*, 730 So. 2d 1190, 1196 n.5 (Ala. 1998) (noting that the generally applicable statute was "specifically altered by the legislature 'to make all homosexual conduct criminal'") (citing commentary to Ala. Rev. Stat. §§ 13A-6-65, 13A-1-1).

A. Sodomy Laws Are Used to Justify Treating Gay People as Criminals

Sodomy laws are used to define lesbians and gay men as inherently criminal, regardless of whether they have ever been charged with a crime, and thereby to deny them a range of benefits and rights that others take for granted. *See generally* Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws*, 35 HARV. C.R.-C.L. L. REV. 103 (2000). While the reported cases capture only a fraction of the occasions when sodomy laws are invoked in this disabling manner, decisions in the areas of family and employment law are illustrative of the phenomenon. The fact that sodomy laws are used to disadvantage lesbians and gay men in these civil contexts makes the constitutionality of the laws a matter of crucial importance.

Family courts have often relied on sodomy laws to justify separating lesbians and gay men from their children. Sharon Bottoms lost custody of her child despite the fact that "the record show[ed] a mother . . . devoted to her son." *Bottoms v. Bottoms*, 457 S.E.2d 102, 108 (Va. 1995). In evaluating whether to take the boy away from his mother, the court presumed that she, as a lesbian, was acting in violation of the Virginia sodomy law: "Conduct inherent in lesbianism is

generally applicable sodomy laws and are therefore disadvantaged in family, employment, and immigration contexts).

punishable as a Class 6 felony in the Commonwealth; thus, that conduct is another important consideration in determining custody." *Id.* (citation omitted); *see also Roe v. Roe*, 324 S.E.2d 691, 694 (Va. 1985) (denying custody to gay man and stating, "the conduct inherent in the father's relationship is punishable as a class six felony .... [W]e have no hesitancy in saying that the conditions under which this child must live daily are . . . unlawful.").

Virginia is not alone in using sodomy laws to break up families. *See, e.g., Ex parte J.M.F.*, 730 So. 2d 1190, 1196 (Ala. 1998) (changing custody from mother to father because mother was a lesbian and stating: "While the evidence shows that the mother loves the child and has provided her with good care, it also shows that she has chosen to expose the child continuously to a lifestyle that is [not] legal in this state ....")[8]; *Thigpen v. Carpenter*, 730 S.W.2d 510, 514 (Ark. Ct. App. 1987) (Cracraft, J., concurring) (denying custody of child to lesbian mother and observing "that sodomy is . . . criminal conduct. This clear declaration of public policy is certainly one that a chancellor may note and consider in child custody cases")[9]; *L. v. D.*, 630 S.W.2d 240, 243 (Mo. Ct. App. 1982) (restricting ability of lesbian mother to visit with her child based in part on fact that

[8] *See also Ex parte H.H.*, 2002 WL 227956, at *13 (Ala. Feb. 15, 2002) (Moore, C.J. concurring) (denying custody to lesbian and stating: "Sexual relations between persons of the same gender violate both the criminal and civil laws of this State .... Any person who engages in such conduct is presumptively unfit to have custody of minor children."); *Ex parte D.W.W.*, 717 So. 2d 793, 796 (Ala. 1998) (imposing restriction on lesbian mother's visitation with her child because "the conduct inherent in lesbianism is illegal in Alabama. R.W., therefore, is continually engaged in conduct that violates the criminal law of this state.") (citation omitted).

[9] The Arkansas Supreme Court recently struck down the state's sodomy law. *Jegley v. Picado*, No. 01-815, 2002 WL 1453664 (Ark. July 5, 2002).

"[d]eviate sexual intercourse with another person of the same sex is a crime in the State of Missouri").

Even in states where sodomy laws do not exist, courts have relied on the existence of sodomy laws in other states to justify separating parents from their children. *See, e.g., Chicoine v. Chicoine*, 479 N.W.2d 891, 896 (S.D. 1992) (Henderson, J. concurring in part and dissenting in part) (reversing lower court ruling because it did not restrict visitation by lesbian mother with her child and stating, despite fact that state sodomy law had been repealed in 1977, that it "appears that homosexuals, such as Lisa Chicoine, are committing felonies"); *Constant A. v. Paul C.A.*, 496 A.2d 1, 5 (Pa. Super. Ct. 1985) (denying expanded custody to lesbian mother, reasoning that "permitting the appellant the freedom to travel could clearly place the children in a situation with the mother and [her partner], where the adults could be subject to arrest and prosecution for deviant sexual behavior").

Public employers have invoked sodomy laws to justify refusing employment to lesbians and gay men. For example, Georgia's attorney general fired Robin Shahar based on his assumption that, as a lesbian, she must be violating the state's sodomy law. *Shahar v. Bowers*, 114 F.3d 1105, 1104 & n.17 (11th Cir. 1997); *see also Padula v. Webster*, 822 F.2d 97, 104 (D.C. Cir. 1987) (affirming rejection of lesbian applicant to the FBI in part because employee would have to work in states with sodomy laws); *Childers v. Dallas Police Dep't*, 513 F. Supp. 134, 147 & n.21 (N.D. Tex. 1981) (upholding refusal to hire gay man for a non-officer position based in part on Texas sodomy law); *Gaylord v. Tacoma Sch. Dist. No. 10*, 559 P.2d 1340 (Wash. 1977) (approving dismissal of gay public employee because state sodomy law made him "immoral").

B. Sodomy Laws Are Used to Discredit the Voice of Lesbians and Gay Men in Political Discourse

Sodomy laws are invoked in political debates on issues ranging from whether non-discrimination laws should cover sexual orientation to whether police should gather statistics about anti-gay hate crimes. Where existing laws are brandished in political debate as critically important guides for what action government should take, the constitutionality of such laws becomes an especially "important question" that merits review by this Court. S. Ct. R. 10(c). While it is not the Court's role to weigh in on the merits of the various policy disputes (*e.g.*, whether sexual orientation should or should not be included in a hate crime statute), it is both necessary and proper for the Court to ensure that one side in a national debate is not consistently skewing the terms of that debate by invoking laws that violate the Constitution. *See, e.g., Zelman v. Simmons-Harris*, __ U.S. __, 122 S. Ct. 2460 (2002) (addressing constitutionality of school voucher programs not to decide policy debate about whether public funds should be used to support religious schools, but to answer the question, often raised in these debates, whether such use is constitutional); *Romer v. Evans*, 517 U.S. 620 (1996) (addressing constitutionality of amendment barring class of individuals from seeking anti-discrimination protection not in order to decide the policy debate about whether state and local anti-discrimination laws should include sexual orientation, but to prevent that debate from being short-circuited through unconstitutional means).

Laws prohibiting sodomy are cited in political debate to chill the participation of lesbians and gay men and to devalue their views. For example, Puerto Rico's sodomy law was used to intimidate and discredit the Reverend Margarita Sanchez de Leon, a lesbian, when she appeared before the Puerto Rico legislature to testify against legislation opposed by Puerto Rico's lesbian and gay community. *Gay Rights*

Center Stage in Puerto Rico, Seattle Gay News, Feb. 23, 2001. Others had spoken for and against the bill without incident, but as Rev. Sanchez rose to speak, a legislator inquired for the record whether she was a lesbian. The legislator then warned her that lesbians and gay men are subject to criminal prosecution under Puerto Rico Penal Code Art. 103, which proscribes sodomy. *Id.*[10]

In another stark example, the Texas Republican party pledged to provide a "big tent" for all viewpoints, and bound itself through its bylaws to the free speech requirement of the Texas constitution to make good on the promise. However, while it allowed pro-choice Republicans to attend its state convention, it balked at allowing a gay Republican group. As the party's executive director explained, "[i]n the state of Texas . . . sodomy is still a crime. I did not think we should have anything at our convention that encourages breaking the law." R.G. Ratcliffe, *Gay Republicans Win Lawsuit Against GOP*, Houston Chronicle, June 15, 1996, at 1; *see* Associated Press Newswire, *Republicans Refuse Gays' Request for Spot at State Convention*, May 26, 1996.

Sodomy laws are also used in political debates to justify denying gay people protection from discrimination and violence. In response to a proposal to enact hate crimes legislation that would cover sexual orientation, one legislator asked in debate, "Why should we pass a law protecting someone who is breaking the law?" Cherrill Crosby, *Utah Committee Fails to Reach Accord on Including Gays in Hate-Crimes Bill*, Salt Lake Tribune, Oct. 17, 1991, at B2. Ultimately, another representative concluded, "[H]omosexuality, sodomy, is prohibited under Utah law, so the effect of granting special protection . . . to homosexuals

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[10] The constitutionality of Puerto Rico Penal Code Art. 103 is currently being challenged in *Sanchez v. Secretario de Justicia*, No. AC-2000-63 (Puerto Rico S. Ct.).

would be contradictory under Utah law." Floor Debate, Statement of Rep. Merrill Nelson, 49th Utah Leg., Gen. Sess. (Feb. 11, 1992) (House recording no. 1, side A). The law did not pass.

Similarly, in Texas, the very existence of § 21.06 bolstered efforts to repeal an Austin ordinance that gave insurance benefits to the same-sex domestic partners of city employees. Opponents waged a successful repeal campaign by arguing that the benefits were "illegal because of Texas's sodomy law." Chuck Lindell, *Domestic Partners Stung By Loss of Insurance Benefits*, Austin American-Statesman, May 12, 1994, at B1. Numerous city employees instantly lost health insurance for their partners. *Id.*

Sodomy laws are also used in political debates about whether lesbians and gay men should be barred from serving as adoptive or foster parents, despite a critical national shortage of people willing to fill those roles. In Mississippi, the state's sodomy law was invoked in support of legislation precluding adoption by gay or lesbian couples. As one legislator stated, "A homosexual relationship implies the exercise of illegal activities, and no child should be permitted to enter that type of setting." Gina Holland, *Miss. Legislature Passes Ban on Adoptions by Gay Couples*, Baton Rouge Advocate, Apr. 21, 2000, at 7B. Similarly, Arkansas banned foster parenting by lesbians or gay men based in part on Arkansas's same-sex-only sodomy law. A member of the state administrative board that passed the policy explained the connection as follows: "Arkansas still has sodomy laws on the books. Based on that law, I believe that it's wrong to place our foster children in those homosexual homes." Associated Press, *Arkansas Nears Ban on Gay Foster Parents*, Dallas Morning News, Aug. 26, 1998, at 11A.

Texas's sodomy law has even been used to deny funding to organizations that provide HIV services to the gay

community. Greg Beets, *State Law Hampers Fight Against AIDS*, Daily Texan, Jan. 12, 1990, at 4; *see* Tex. Health & Safety Code Ann. §§ 85.011(a); 85.015(a)(2); 95.037(a) (banning funding of AIDS service organizations if they "advocate or promote conduct that violates state law").

C. People Are Prosecuted For Violation of Sodomy Laws

In addition to their uses in civil cases and in political discourse, sodomy laws remain part of prosecutors' arsenal and are used to arrest and convict people for private, consensual sexual activity that forms a core part of the lives of millions of Americans. The reality that these laws are enforced makes the question of their constitutionality an issue worthy of consideration by the Court.

Matthew Limon is serving a 206-month prison sentence (over 17 years) because he performed consensual oral sex on another male when they were both teenagers. *State v. Limon*, No. 85,898, slip op. at 2-3 (Kan. Ct. App. Feb. 1, 2002), *review denied*, No. 00-85898-A (Kan. June 13, 2002). Had Limon or the other teenager been a girl, Limon would be serving no more than a 15-month sentence. *Id.* at 5.

Limon's plight is a product of the interaction between Kansas's sodomy law and the state's so-called "Romeo and Juliet" law. In Kansas, criminal sodomy includes "sodomy with a child who is 14 or more years of age but less than 16 years of age." Kan. Stat. Ann. § 21-3505(a)(2). Because Kansas believes that "consensual sexual activity between a young adult and a not-quite adult, although wrong, is not as criminal as sexual activity between persons farther apart in age," *Limon*, slip op. at 6, it enacted a Romeo and Juliet law that significantly reduces the criminal penalties for sodomy where teenagers have sex with other teenagers. *See* Kan. Stat. Ann. § 21-3522(a)(2). Because Kansas limited the

application of the Romeo and Juliet law to "members of the opposite sex," *id.*, however, Limon was not eligible for the lesser penalty and was sentenced under the general sodomy statute. His sentence was almost 16 years longer than it would have been had he been a heterosexual teenager who committed precisely the same acts, with precisely the same age difference. *Limon*, slip op. at 5.[11]

Matthew Limon is not the only person who has faced serious consequences as a result of a sodomy conviction or charge. Calvin Burdine, a gay man charged with a capital crime in Texas, heard his sodomy conviction invoked to support the state's argument that he should be sentenced to death because he posed a future danger to society. *See Burdine v. Johnson*, 66 F. Supp. 2d 854, 857 (S.D. Tex. 1999) (granting writ of habeas corpus for denial of effective assistance of counsel), *aff'd*, 262 F.3d 336 (5th Cir. 2001) (en banc), *cert. denied*, *Cockrell v. Burdine*, 122 S. Ct. 2347 (2002). Kevin Devescovi lost the license to operate his bar after being charged with sodomy. *Devescovi v. Ventura*, 195 F. Supp. 2d 1146, 1147 (D. Minn. 2001) (two men arrested and charged with consensual sodomy with women in private). Numerous others have been arrested and convicted for having, or inviting, private, non-commercial, consensual sodomy. *See, e.g.*, *City of Oklahoma City v. Sawatzky*, 906 P.2d 785 (Okla. 1995) (man arrested for inviting another to have sex in private); *Christensen v. State*, 226 Ga. 474 (1996) (man arrested for inviting another to have sex in private); *see also City of Topeka v. Movsovitz*, 960 P.2d 267 (Kan. 1998), *denying review of* No. 77,372 (Kan. Ct. App. Apr. 24, 1998) (man arrested for talking about having sex

[11] Such laws are not unique to Kansas. Indeed, Texas has a comparable "Romeo and Juliet" law that is limited to heterosexual teenagers. Texas makes it a crime to have sex with a person under 17, *see* Tex. Penal Code Ann. § 21.11(a)(1), but provides an absolute affirmative defense where the teenagers are no more than 3 years apart in age "and of the opposite sex," *see id.* § 21.11(b)(1).

with another; act was criminal only because both individuals were men). Most recently, Missouri arrested adults for engaging in consensual same-sex sodomy. *See Full Assault on Sodomy Laws*, The Advocate, Aug. 20, 2002.

Sodomy laws inflict both direct and indirect harms on gay and lesbian individuals, families, and communities that are substantial and pervasive. These harms constitute "compelling reasons" for the Court to review the constitutionality of sodomy laws such as § 21.06. S. Ct. R. 10.

CONCLUSION

The Court should grant *certiorari* in this case to declare that the criminality of conduct cannot depend on the sexual orientation of the actor. It should grant review of both the equal protection and the due process questions in light of the devastating ways that sodomy laws are used in both civil and criminal contexts to disadvantage lesbians and gay men. And the Court should use this case to reconsider its ruling in *Bowers v. Hardwick*, 478 U.S. 186 (1986).

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